Esau Rogers, P-54800
Centinela State Prison
P.O. Box 931 - D3-1231
Imperial, CA 92251-0931

FILED
2008 JUL 2 PM 4:53
CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY ________ DEPUTY

In Pro Se

NUNC PRO TUNC
JUN 27 2008

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ESAU ROGERS, Plaintiff, v. S. RIVAS, et al., Defendants.	Case No. 07 cv 2010 W (JMA) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT, AND TO STRIKE Hon. Jan M. Adler United States Magistrate Judge

I

INTRODUCTION

This action is brought pursuant to 42 U.S.C. § 1983, and jurisdiction is based upon 28 U.S.C. §§ 1331 and 1343.

All of the conduct giving rise to the claims alleged herein arose in Imperial County, California. Therefore, venue is proper under 28 U.S.C. § 1391.

This is a claim for damages and injunctive relief brought under 42 U.S.C. § 1983 against prison officials for violations of Plaintiff's rights to freedom of speech (redress) as protected by the First Amendment of the United States Constitution, and to be free from cruel and unusual punishment as protected by the Eighth Amendment of the United States Constitution. Specifically at issue are Plaintiff's rights to freedom of speech in seeking redress, and unlawful retaliation for seeking redress, constituting cruel and unusual punishment.

II

STATEMENT OF ALLEGATIONS

Plaintiff is informed and believes, and thereon alleges, that Defendants deprived him of his First Amendment right to freedom of speech, and his Eighth Amendment right to be free from cruel and unusual punishment in the form of retaliation for filing administrative appeals

In doing as alleged herein, Defendants acted with deliberate indifference to Plaintiff's rights, and subjected him to unnecessary and wanton infliction of psychological and emotional distress.

Defendants acted despicably, knowingly, willfully, and maliciously, and with reckless and callous disregard for Plaintiff's federally protected rights.

As a direct and proximate result of all of the Defendants' action herein alleged, Plaintiff suffered, and continues to suffer, severe emotional and psychological distress. Accordingly, Plaintiff is entitled to an award of compensatory and punitive damages for inuries suffered.

Plaintiff is entitled to injunctive relief, including, but not limited to, an order by the Court requiring that Defendant Rivas be monitored until the Court is satisfied that such actions by her will no longer occur or be tolerated by supervisory staff.

The constitutional deprivations described herein are the proximate result of the official policies, customs and pervasive practices of the Defendants. Defendants were and are aware of all of the unconstitutional conduct complained of herein, and have either condoned or been deliberately indifferent to such conduct.

Defendants' conduct violates 42 U.S.C. § 1983, because that conduct constitutes deliberate indifference to Plaintiff's rights to freedom of speech, and to be free from cruel and unusual punishment in violation of his First and Eighth Amendment rights.

III

ARGUMENT

Plaintiff is informed and believes, and thereon alleges, that all allegations of material fact should be accepted as true and construed in the light most favorable to Plaintiff. (See, American Family Ass'n v. City & County of San Francisco (9th Cir. 2002) 227 F.3d 1114, 1120, cert. denied, 537 U.S. 886 (2002)).

In applying Eighth Amendment law to test the validity of Plaintiff's allegations, is is important to keep in mind that Plaintiff is a pro se plaintiff whose complaint cannot be held to the same level of scrutiny as one drafted by a skilled attorney. As noted by the Ninth Circuit Court, "'The Supreme Court has instructed the federal courts to liberally construe the "inartful pleading" of pro se litigants.'" (McGuckin v. Smith (9th Cir. 1992) 974 F.2d 1050, 1055, overruled on other grounds; WMX Technologies, Inc. v. Miller (9th Cir. 1997) 104 F.3d 1133, 1136, quoting Elderidge v. Block (9th Cir. 1987) 832 F.2d 1132, 1137). As a litigant who not only put together his allegations without benefit of counsel, but is functionally illiterate in applying law, Plaintiff is entitled to the benefit of any doubt regarding the allegations discernible in the body of the Complaint and the documents attached thereto.

///

///

///

IV

ALL NAMED DEFENDANTS ARE NOT ENTITLED TO SOVEREIGN IMMUNITY

At all times mentioned in the Complaint, each individual defendant was actine under color of state law.

At all times mentioned in the Complaint, each individual defendant was acting in the official capacity and in the scope and course of their employment.

All of the defendants, and each of them, are also sued in their individual [and] official capacities for the claims alleged in the Complaint.

Although Plaintiff may not have articulated the separation of individual and official capacities to the satisfaction of the Defendants, the § 1983 SD Form (Rev. 5/98) does not allow for the [separate] division of individual and official capacity, which clearly states "(Check one or both)." Plaintiff simply checked the appropriate boxes which apply.

With respect to the Defendants' being sued in their official capacities. Plaintiff claim simply applies to his request for injunctive relief.

The Young doctrine provides an exception to the Eleventh Amendment bar under which prospective injunctive and declaratory relief against state officers sued in their official capacities for alleged violations of federal law. (Ex Parte Young (1908) 209 U.S. 123; Kentucky v. Graham (1985) 473 U.S. 159, 167). Therefore the various named officials were properly sued in their official capacities for such relief.

V

EXHAUSTION OF ADMINISTRATIVE REMEDIES NOT REQUIRED

Exhaustion of administrative remedies is not required if the administrative remedy is unavailable or inadequate.

There are currently no established procedures, provisions and/or adequate means by which to appeal an appeal decision other than the administrative appeal itself. As discussed infra, all Defendants except Rivas, had an opportunity and a duty to satisfactorily resolve the issues raised in the administrative appeal. As such, [any] additional administrative remedies were not utilized based upon unavailability and futility.

Accordingly, Defendants' assertions regarding the exhaustion requirements of administrative remedies is moot.

VI

PLAINTIFF HAS STATED A COGNIZABLE CLAIM FOR RELIEF AGAINST DEFENDANTS BATCHELOR, DEGEUS, HERNANDEZ, SOUKUP AND STEIN

For liability under § 1983, there must be a sufficient link between the constitutional violations and any action or inaction on the Defendants' part. (See, Rizzo v. Goode (1976) 423 U.S. 362, 370, 371, 376).

Plaintiff is informed and believes, and thereon alleges, that Defendants clearly confuse a lack of knowledge of the failure of other officials to ensure Plaintiff's constitutional rights with a lack of duty on their part to assure that the administrative appeal issues were constitutionally sound. As the officials designated to hear prisoners' appeals, they had a duty to conduct at least a minimal investigation to determine whether there was any merit to Plaintiff's appeal. (See, Dimarzo v. Cahill (1st Cir. 1978) 575 F.2d 15, 17-18 and n. 3 ("[f]ailure to act where there is a duty to act can give rise to an actionable claim under section 1983"). The administrative appeal was sufficient at least to put them on notice of the constitutional violations. Whether or not, based on the administrative appeal, Defendants knew or should have known that Plaintiff had been deprived of his rights, they knew or should have known enough to investigate further.

As indicated in Plaintiff's Complaint, Exhibit A, Director's Level Appeal Decision (Page 20 of 22), on June 13, 2007, Defendants were issued the following order: "The Centinela State Prison (CEN) shall prepare an amended response to the appellant's appeal. The institution's response will be in compliance with AB 05/03, specifically Attachment 'E.' [¶] The issue was discussed with the office of Chief Deputy Warden." However, to date, Defendants have failed and/or refused to comply. (Complaint at Exhibit A).

Defendants' failure to investigate further to determine whether Plaintiff's constitutional rights were violated, as alleged, constituted reckless disregard of Plaintiff's rights.

VII

PLAINTIFF HAS STATED A COGNIZABLE CLAIM FOR RELIE AGAINST DEFENDANT ALMAGER

To recover for damages under 42 U.S.C. § 1983, a plaintiff must establish defendant's personal responsibility for the claimed deprivation of a constitutional right. (Duncan v. Duckworth (7th Cir. 1981) 644 F.2d 653, 655). However, a defendant's direct participation in the deprivation is not required. An official satisfies the personal responsibility requirement of § 1983 if he or she acts of fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at his or her direction or with his or her knowledge and consent.

Like the sheriff in Wolf-Lillie v. Sonquist (7th Cir. 1983) 699 F.2d 864, Defendant Almager knew of the actions of his subordinates which resulted in a constitutional violation, and failed to take any preventive action.

With respect to the alleged failure to exhaust administrative remedies against Defendant Almager, refer to Ground V supra, for additional information regarding this issue.

VIII

PLAINTIFF HAS STATED A COGNIZABLE CLAIM FOR RELIEF AGAINST DEFENDANT RIVAS

Prison officials may not retaliate against a prisoner for exercising First Amendment rights. (Rizzo v. Dawson (9th Cir. 1985) 778 F.2d 527, 531-532 Franklin v. Murphy (9th Cir. 1984) 745 F.2d 1221; Knecht v. Collins (S.D. Ohio, 1995 903 F.Supp. 1193, 1204).

Any act in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the same act, when taken for a different reason, would not state a cognizable claim. (Pratt v. Rowland (N.D. Cal. 1991) 769 F.Supp. 1128, 1134; Huffman v. Fiola (N.D. Cal. 1994) 850 F.Supp. 833, 838 (N.D. Cal. 1994); Hines v. Gomez (N.D. Cal. 1994) 853 F.Supp. 329, 330; Schroeder v. McDonald (D. HI 1993) 823 F.Supp. 750, Schroeder v. McDonald, 41 F.3d 1272 (9th. 1994).

Deliberate retaliation by state actors against an individual's exercise of the right to seek judicial redress is "precisely the sort of oppression that § 1983 [is] intended to remedy." (Soranno's Gasco v. Morgan (9th Cir. 1989) 874 F.2d 1310, 1314, quoting Franco v. Kelly (2d Cir. 1988) 854 F.2d 584, 589; Morello v. James (2d Cir. 1987) 810 F.2d 344, 347).

As indicated in Plaintiff's Complaint, page 3 (Page 4 of 22), Plaintiff is an African American who is currently housed at a prison which has constant racial tension, and which is predominantly Hispanic, both with correctional staff and prisoner population. (Complaint at p. 3 (Page 4 of 22)).

Defendant Rivas is Hispanic. Plaintiff has previously filed administrative appeals against her for repeated acts of disrespect and displays of contempt. Defendant Rivas has retaliated against Plaintiff because of her dislike for him, and because he has filed administrative appeals against her.

It is rarely appropriate to dismiss a complaint where there is a factual dispute regarding a defendant's motive or intent, and such motive or intent is a central element to resolving a plaintiff's claims. (See, e.g., Douglas v. Anderson (9th Cir. 1981) 656 F.2d 528; Haydon v. Rand (9th Cir. 1979) 605 F.2d 453, 455 n. 2; Foster v. Arcata (9th Cir. 1985) 772 F.2d 1453, 1459; Knecht v. Collins, supra, 903 F.Supp. 1193, 1204).

IX

DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

As the Supreme Court has emphasized, a state official who violates federal law "is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." (Scheuer v. Rhodes (1974) 416 U.S. 232, 237, quoting Ex Parte Young (1908) 209 U.S. 123, 160, see also, Demery v. Kupperman (9th Cir. 1984) 735 F.2d 1139).

A court evaluating a claim of qualified immunity "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." (Conn v. Gabbert (1999) 526 U.S. 286). Deciding the constitutional question before addressing the qualified immunity question also promotes clarity in the legal standards for official conduct. [Citation omitted]. (Ibid.)

The prohibition against retaliatory punishment is "clearly establised law" in the Ninth Circuit, for qualified immunity purposes. (Schroeder v. McDonald (9th Cir. 1995) 55 F.3d 454, 461; Pratt v. Rowland (9th Cir. 1995) 65 F.3d 802, 806; see also, Barnett v. Centoni (9th Cir. 1994) 31 F.3d 813, 815-816).

///

///

///

X

CONCLUSION

The disputed facts in this case clearly demonstrate that the Defendants' assertions are false and misleading, and only serve as a means by which to vilify Plaintiff and his position. Defendants have somply failed to set forth [sufficient] facts or law to show why the Complaint should be dismissed.

Accordingly, Plaintiff respectfully requests this Court to deny Defendants' Motion to Dismiss Complaint, and to Strike, and order the case to proceed.

DATED: June 24, 2008

Respectfully submitted,

Esau Rogers

Esau Rogers
Plaintiff

In Pro Se

DECLARATION OF SERVICE BY MAIL

CASE NAME: ESAU ROGERS v. S. RIVAS, et al.

CASE NO.: 07 cv 2010 W (JMA)

I am over 18 years of age, and a party to the within action. My address is Post Office Box 931 - D3-123L, Imperial, California 92251-0931.

On 6-24-08, I served a copy of the attached "Memorandum Of Points And Authorities In Support Of Opposition To Defendants' Motion To Dismiss, And To Strike," on the below-named person by placing a true copy thereof in an envelope addressed as follows, with the postage thereon fully prepaid, and delivering the sealed envelope to the proper institution (prison) official for deposit in the United States Mail at Imperial, California:

OFFICE OF THE ATTORNEY GENERAL
Attn: Stephen A. Aronis, DAG
110 West A Street, Suite 1100
San Diego, California 92101

Executed under penalty of perjury under the laws of the State of California on 6-24-08, at Centinela State Prison in Imperial, California, County of Imperial.

Esau Rogers
Esau Rogers
Declarant